UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STRATEGIC RESOURCES, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKER, AFL-CIO, DISTRICT LODGE W-24.	Cases	19-CA-070217 19-CA-070224 19-CA-072173 19-CA-072184 19-CA-077901 19-CA-088406 19-CA-103576 19-CA-104377 19-CA-111874
	RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS	

Respondent Strategic Resources, Inc. ("Respondent"), pursuant to Section 102.46(e) of the Board's Rules and Regulations, files the following Brief in Support of Its Exceptions to the Decision of Administrative Law Judge John J. McCarrick (JD(SF)-02-15), (the "ALJD") in the above-captioned cases, which issued on February 4, 2015.

EXCEPTION 1: The Administrative Law Judge erred by concluding that SRI violated § 8 (a)(5) of the Act by unilaterally changing its formula for calculating holiday pay. In support of this exception, Respondent relies on the testimony of Kathy Ausley, Joel Davis, Randall Cox, and Anita Lawson. Respondent also relies on General Counsel's Exhibit 79, and 29 CFR § 4.176(a)(3) ("Payment of fringe benefits to temporary and part-time employees").

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The Administrative Law Judge (the "ALJ") ignored the record evidence to erroneously conclude that SRI implemented a policy of paying employees full eight (8) hours' pay for holidays – regardless of their status as full-time or part-time – and then unilaterally changed its method for calculating holiday pay to prorating for part-time employees. But to do so, the ALJ improperly ignored the witness testimony, documentary evidence, and relevant federal regulations that aligned to support Respondent's consistent message to employees that it would continue the existing practice of pro-rating holiday pay for all employees, including unit employees. After addressing all of the transitional administrative matters associated with the transfer of a service contract from its predecessor, SRI realized that it had overpaid some employees for the first three holidays after SRI assumed the contract on April 27, 2011. At that point, SRI merely addressed the error moving forward by reminding employees to comply with the established policy and correctly enter their prorated holiday rather than the full eight (8) hours that some employees had claimed. This correction was consistent with employees' pre-employment training, the established practice at the predecessor, SRI's unequivocal message to employees that it would continue prorating holiday pay, and the Code of Federal Regulations and the Service Contract Act (SCA).[1] Further, record evidence shows that the sources of the errors were erroneous time entries attributable to employees, which were admittedly overlooked by SRI managers during the transitional period. Given that the General Counsel failed to prove, and there is no record evidence that might suggest SRI intentionally, deliberately, or consciously "changed" its method for calculating and then unilaterally changed it back to avoid any

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[1] The Service Contract Act of 1965, as amended, provides, at §(d) "Obligation to Furnish Fringe Benefits" states:

> The Seller or subcontractor may discharge the obligation to furnish fringe benefits specified in the attachment or determined under subparagraph (c)(2) of this clause by furnishing equivalent combinations of bona fide fringe benefits, or by making equivalent or differential cash payments, *only in accordance with Subpart D of 29 CFR Part 4*."

(Emphasis added).

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obligation under the Act, the ALJ's conclusion that SRI "changed" its method for calculating holiday pay should be reversed.

SRI Did Not Change Its Formula for Calculating Holiday Pay

The General Counsel alleged, at Paragraph 6(a) of the Complaint, that:

> On or about September 5, 2011, Respondent altered its formula for calculating holiday pay for Unit employees.

There was insufficient recorded evidence to support the allegation. To the contrary, the record showed that SRI clearly and expressly communicated to employees prior to the start of the work how it would calculate holiday pay: it would be prorated based on the hours worked the week before the holiday. Tr. 422:3-22; GC Ex. 79, p. 32. When SRI recognized employees had erroneously claimed full days' pay for holidays by entering eight (8) hours into their timesheets on three separate days, and that managers had failed to catch the error in their review of those timesheets, SRI quickly and lawfully addressed the erroneous overpayments. Tr. 449:14-19. Once the error was discovered, SRI did not attempt to recoup the overpayments, it merely moved to avoid more overpayments. Because SRI's discovery and prompt correction after three occurrences of this mistake did not violate the Act, and because the error was limited to only three (3) overpayments on three (3) separate days, the allegation should be dismissed.

1. SRI Continued the Established Practice and Followed the Applicable Regulations for Holiday Pay

When SRI assumed the JBLM service contract in April 2011, the historical practice was that holiday pay for part-time Unit employees was prorated, based on the hours worked the week preceding the holiday. SRI used New Hire Orientation to train employees on timekeeping procedures, and to advise them that holiday pay would be prorated. Counsel for the General Counsel's own witnesses confirmed the long-standing practice through sworn testimony. See,

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for example, Counsel for the General Counsel's exchange with witness Kathy Ausley:

> Q: Okay. I want to ask you some questions about working conditions after SRI took over in specific areas. First we'll start with holiday pay. When you worked for LSG, how were you paid for holidays?
>
> A: What we would do is if you worked a 40-hour week prior, you would get the eight-hour week -- the eight-hour day for that holiday, that particular holiday, or it was [pro]rated. If you worked 20 hours, you only got the four hours and so on and so forth.

Tr. 33:10-18.

Counsel for the General Counsel's witness Joel Davis testified, consistent with Ms. Ausley:

> Q: . . . Let me ask you specifically, when you worked for LSG, how were you paid for holiday pay?
>
> A: It was prorated.
>
> Q: Okay. And what do you mean by "prorated?"
>
> A: It was based on the hours that we worked prior, the prior week.

Tr. 77:11-16.

Ms. Ausley's and Mr. Davis's independent testimony was confirmed by Respondent's Project Manager Randall Cox. In response to direct examination by Counsel for the General Counsel, Mr. Cox testified that employees' "holiday hours are prorated based on the number of hours they work . . . the week prior to the holiday." Tr. 266:19-267:9. The record also shows that employees were responsible for entering their time, using the same computer program ("Deltek") LSG employees had used. See, *e.g.*, Tr. 514:20 – 515:13.

Thus, Ms. Ausley's, Mr. Davis's, and Mr. Cox's testimony is consistent with the information provided to new SRI employees hired to work at JBLM for SRI. Those employees underwent orientation and training where they learned about SRI's processes, expectations and

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benefits. That training also covers how employees would be paid for holidays. Tr. 422:3-17. Specifically, employees were told that there would be ten (10) paid holidays, and that holiday pay would be prorated based on the work they perform in the week prior. Tr. 287:10-23; Tr. 448:5-7. See also GC Ex. 79, p. 32.

SRI's proration of holiday pay is consistent with 29 CFR § 4.176(a)(3) ("Payment of fringe benefits to temporary and part-time employees"), which provides:

> As set forth in § 4.165(a)(2), the [Service Contract] Act makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees. . . . However, in general, such temporary and part-time employees are only entitled to an amount of the fringe benefits specified in an applicable determination which is proportionate to the amount of time spent in covered work. The application of these principles may be illustrated by the following examples:
>
> (1) Assuming the paid vacation for full-time employees is one week of 40 hours, a part-time employee working a regularly scheduled workweek of 16 hours is entitled to 16 hours of paid vacation time or its equivalent each year, if all other qualifications are met.
>
> (2) In the case of holidays, a part-time employee working a regularly scheduled workweek of 16 hours would be entitled to two-fifths of the holiday pay due full-time employees. It is immaterial whether or not the holiday falls on a normal workday of the part-time employee. Except as provided in § 4.174(b), a temporary or casual employee hired during a holiday week, but after the holiday, would be due no holiday benefits for that week.
>
> (3) Holiday or vacation pay obligations to temporary and part-time employees working an irregular schedule of hours may be discharged by paying such employees a proportion of the holiday or vacation benefits due full-time employees based on the number of hours each such employee worked in the workweek prior to the workweek in which the holiday occurs or, with respect to vacations, the number of hours which the employee worked in the year preceding the employee's anniversary date of employment. For example:

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> (i) An employee works 10 hours during the week preceding July 4, a designated holiday. The employee is entitled to 10/40 of the holiday pay to which a full-time employee is entitled (i.e., 10/40 times 8 = 2 hours holiday pay).

Neither Ms. Ausley nor Mr. Davis testified that they were ever told by any SRI supervisor, manager, or representative that they would receive eight (8) hours' pay for holidays regardless of their work the week prior, and neither contradicted Mr. Cox's or Respondent's Director of Human Resources Anita Lawson's testimony regarding communications to new hires. To the contrary, Ms. Ausley's and Mr. Davis's testimony suggests that both were surprised when they were overpaid for the first three holidays after SRI took over the contract at JBLM. Perhaps most significant is Ms. Ausley's testimony regarding notice of the overpayment. As she testified, the overpayments were not identified as inconsistent with a new policy or any "change" to the standard practice. Rather, the overpayments were described as "incorrect." Tr. 34:16-20; 35:2-5.[2] See also Tr. 449:19, where Ms. Lawson testified that the overpayment was an error.[3]

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[2]Ms. Ausley testified:

> "When we got to Labor Day,– we put our eight hours on like we had been doing and we got called and said it" . . .
> "So we put our eight hours in like we had been doing. And then we got called and said it was – incorrect. And we had to change it because not all of us worked the 40 hours."

TR 34:16-18; 35: 2-4.

Joe Davis testified:

> "I entered my DELTEK for that holiday. I put 8 hours. And I got a phone call from dispatch telling me I needed to change it."

TR 78:16-18.

[3]Ms. Lawson also provided testimony to explain how the oversight occurred:

> One of the main issues when you transition over to a new contractor is people [employees] being paid on time. And so we have certain things that are critical in priority. Payment on time is critical. So those 2 things take on a new focus at the very beginning of a contract 3 to make sure that there's a smooth transition, because the 4 impact of those things could be dire. There are a lot of things that go on in the first few months; there are changes regarding staffing. If you have different individuals that are trying to ramp up, you're trying to establish your PMO [Program Management Office].

TR 448:22 – 449:11.

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a. SRI Discovered and Lawfully Corrected an Employee- Originated Error

As SRI took over operations at JBLM, it experienced a period of transition. Tr. 448:7-8. As payroll and accounting functions were the primary focus, Tr. 448:23 – 449:8, certain employees were apparently overpaid for the first three (3) holidays, Memorial Day (May 30, 2011), Independence Day (July 4, 2011), and Labor Day (September 5, 2011). Tr. 449:14-17. When the transitional period was completed and the Respondent discovered the past error, the Respondent did not seek reimbursement for the erroneous overpayments. Tr. 449:18-19.

SRI respectfully submits that any overpayment for the three (3) holidays at issue, as Mr. Cox testified, was simply the result of an administrative oversight in SRI's review of the employees' completed time entry for those three holidays and, as GC witnesses Ausley and Davis testified, an error that ran counter to everything employees were told, trained on, and expected. The predecessor's conduct, the applicable regulations, SRI's communications and training to new hires, and the witnesses' testimony align to establish the same thing: holiday pay for employees covered by the Service Contract Act is to be prorated. SRI always intended to follow the applicable law and prorate employees' holiday pay from the start. Indeed, the fact that only three (3) holidays passed (which were irregularly spaced over a several week period) is further evidence the overpayment was inadvertent, flowing from employees' incorrect claims for eight (8) hours of holiday pay. That error was corrected as soon as possible. Thus, SRI did not unlawfully "change" how employees were paid for holidays, and SRI did not attempt to recoup any overpayment as a result of employees entering the incorrect holiday hours into their timesheets.

This case is very similar to other cases where the Board has recognized that

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administrative errors, rather than deliberate conduct by management, were at play. For example, in *Eagle Transport Corp.*, 338 NLRB 489 (2002), the employer raised and then lowered employees' wage rates. The temporary increase was the result of an administrative error and was corrected upon discovery. In those circumstances, the Board agreed with the administrative law judge that the administrative error did not constitute the grant and subsequent rescission of a wage increase, or any other "change" that required bargaining. See also *The Boeing Co.*, 212 NLRB 116, 116 (1974) (employer did not violate § 8(a)(5) by unilaterally reclassifying 54 employees; classifications were the result of the employer's mistake, which was corrected upon discovery); and *Specialty Container Corporation*, 171 NLRB 24, 29 (1968) (employer did not unlawfully change employee's job by restoring his status to a lesser classification; employer lawfully corrected months' old clerical error that temporarily promoted employee). The overpayments in this case were relatively short-lived, and perhaps more difficult to discover than the errors excused by the Board in the cases cited above. Unlike payments made every payday, week-in and week-out, employees were overpaid only three (3) times for holidays within a span of several weeks.

The Administrative Law Judge noted that the orientation materials, the established practice, and employees' expectations aligned: holiday pay would and should be prorated. For whatever reason, the ALJ ignored the unequivocal text of the applicable CFR that further harmonized the record evidence that holiday pay would be prorated. The ALJ also ignored the fact that employees were responsible for entering their time through Deltek for the holidays in question. Indeed, employees were required to attest to the accuracy of their time entries. See each timesheet entered by Counsel for the General Counsel as GC Ex. 58, which contain the following clause:

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> By signing this timesheet you are certifying that the hours were incurred on the charge and day specified in accordance with company policies and procedures.

While the ALJ recognized that employees were erroneously paid eight (8) hours of holiday pay, neither the General Counsel nor the ALJ pointed to any evidence that the error was the result of an affirmative act by SRI. There is no evidence to suggest SRI acted intentionally and then backtracked. Moreover, neither the General Counsel nor the ALJ cited any way in which Unit employees were adversely affected by the alleged "change" to correct further overpayments of holidays. Indeed, there was no evidence of any "effects" that would need to be bargained as a result of three (3) occurrences; no employee was asked to repay any overpayment, and going forward employees were paid consistent with the unequivocally communicated formula and the applicable CFR. And the overpayments were clearly a mistake initiated by the employees' time entries, which were admittedly overlooked by Respondent. But the ALJ held that the mere fact that some employees were inadvertently overpaid –as the result of erroneous employee entries – was apparently enough to impose a bargaining obligation on Respondent. The ALJ concluded further that, because it was unclear how the mistake occurred, or how it was discovered, there was no basis to conclude it was, in fact, an honest mistake. Given the steps SRI took to ensure employees were aware that holiday pay would be prorated, and the fact that it did not make any attempt to recoup any overpayment, it seems unjust and punitive to require SRI to pay for its honest mistake where employees had no realistic expectation they would be paid a full day's pay when no such arrangement had been in place or suggested.

The undisputed evidence and conclusions are that SRI only moved to address and correct erroneous employee time entries moving forward. There is no evidence that SRI ever indicated it had disregarded, or intended to abandon, the stated and expected practice of prorating holiday

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pay. Thus, the ALJ's citation to, and apparent reliance on, *Mid-Wilshire Health Care Center*, 337 NLRB 72, 74 (2001),[4] is misplaced. There, the employer deliberately acted on its mistaken belief that a wage increase had been tentatively agreed to by the employees' collective-bargaining representative. When it realized the wage increase was not included in the agreement, the employer went out of its way to tell employees that the wage increase was not included in the agreement and, therefore, it was rescinding it. However, in this case, Ms. Ausley, who was both an employee and a bargaining unit member at the table with the union, acknowledges in her testimony that changing the holiday pay policy was not something negotiated nor agreed to at the bargaining table with the union. TR 34: 9-11. Further, in the above cited case, the employer sent the message to employees that it could, and would – and did – unilaterally change employees' terms and conditions of employment, which would undermine employees' confidence in the union's ability to protect the status quo.

In this case, Respondent only corrected its mistake; it did not move to undermine the bargaining process, generally, nor did it do anything that would reasonably undermine the Union's status as the employees' exclusive collective-bargaining representative. In this regard, the ALJ's rejection of *Eagle Transport* as precedent for SRI's lawful, discrete, and good faith correction of an inadvertent mistake was error. That error was compounded by the related and erroneous conclusion that SRI's correction violated the Act. Therefore, the ALJ's erroneous conclusions should be reversed.

Exception 2: The Administrative Law Judge Erroneously Ordered SRI to Provide the Union with Certain Information

As the ALJ noted:

> Counsel for the General Counsel represents that it no longer seeks a remedy requiring Respondent to bargain with the Union regarding the bargaining unit

[4]The ALJ cites to *JPH, Mgt.*, 337 NLRB 72, 74 (2001).

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> employees since Respondent no longer employs those employees. While not stated, it appears that Respondent is no longer the contractor with the Department of Defense for troop transportation at JBLM. . . . Counsel for the General Counsel further requests that the portion of the complaint requesting a bargaining order be withdrawn. Counsel for the General Counsel's request to withdraw that the portion of the complaint requesting a bargaining order is granted.

ALJD 48:10-20.

Based on the ALJ's acceptance that SRI no longer employs the bargaining unit employees, and is no longer the contractor for troop transportation at JBLM, and the fact that he granted Counsel for the General Counsel's request to withdraw its demand for a bargaining order, that portion of the recommended remedy ordering SRI to provide the Union with the requested information is erroneous and should be reversed. The Board has held that where a request for information is moot, the employer has no statutory obligation to furnish the information requested. *Glazers Wholesale Drug Co.*, 211 NLRB 1063 (1974), enfd. 523 F.2d 1053 (5th Cir. 1975), cert. denied 425 U.S. 913 (1976). Because there has been no collective-bargaining relationship between SRI and the Union since at least late-April 2014, and because the requested information is now irrelevant to the Union's representation of the unit employees, there is no basis to order SRI to produce the information at issue. As such, that portion of the proposed order should be rejected.

> **Exception 3:** The Administrative Law Judge Erroneously Ordered SRI to Post a Notice to Employees at JBLM, and Distribute Copies of a Notice Electronically

SRI no longer employs the bargaining unit employees, and is no longer the contractor for troop transportation at JBLM. See, *e.g.*, ALJD 48:10-20. Despite those facts, and despite the Counsel for the General Counsel's explicit request "that Respondent be required to *mail* the notice to employees to all bargaining unit employees employed during the period in which the unfair labor practices occurred," the ALJ recommends that SRI be ordered to post a notice at the

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former facility, email it to employees and to an employee-accessible intranet or internet site. ALJD 50:18-22. SRI respectfully submits that, in the circumstances, an order requiring SRI to mail the Notice to Employees is sufficient, and consistent with the remedy requested by the Counsel for the General Counsel. To the extent the proposed order is inconsistent with the requested remedy, it should be clarified to require only a mailing of the Notice.[5]

CONCLUSION

SRI did not "change" its formula for calculating holiday pay. It always intended – as it communicated to employees before they were hired, as the employees had been paid for years before by the predecessor, and as dictated by federal regulations – to pay employees on a prorated basis. SRI did not unilaterally change its formula and then "change" it back to proration. Rather, it failed to catch erroneous employee time entries, and promptly moved to avoid additional errors going forward. The ALJ's erroneous conclusion that Respondent unlawfully changed its formula for calculating holiday pay should be reversed.

With regard to the remedy, the ALJ's proposed order that SRI post and electronically distribute a copy of the Notice to Employees, and provide the Union with requested information overlook the fact that SRI is no longer the employer for unit employees and has no collective-bargaining relationship with, or bargaining obligation with regard to the Union or the unit employees. Counsel for the General Counsel's requested remedy does recognize that fact, and is appropriately limited. As such, the proposed order should be conformed to delete the posting and production requirements.

[5]Respondent recognizes that, given the ALJ's treatment of SRI's status as the former employer, with no presence at JBLM, the proposed order requiring SRI to provide the Union with requested information, and the inclusion of a posting component may have been inadvertent errors.

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Dated at Seattle, Washington, this 25th Day of March, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused to be served in the manner noted below a copy of the document to which this is attached (Respondent's Post-Hearing Brief to the Administrative Law Judge), on the following:

Gary Shinners, Executive Secretary National Labor Relations Board Office of the Executive Secretary 1099 14th Street NW, Rm. 5400 E. Washington, DC 20570-0001	BY:		U.S. MAIL HAND DELIVERED OVERNIGHT MAIL FACSIMILE
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DATED this 25th day of March, 2015.

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